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No. 86-1515

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

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ROBERT ONG HING and ALICE HING,  
petitioners,

vs.

HARVEY R. McELHANON and  
DOREEN T. McELHANON,

Respondents.

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BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTORARI TO  
THE SUPREME COURT  
FOR THE STATE OF ARIZONA

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## SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari presents no issue warranting review by this Court. First, the Hings have been afforded a full and complete review of all of their claims by the trial court and the Arizona Supreme Court. Second, even if the Hings' appeal had been disposed of by summary process the Due Process clause would not have been violated. Finally, only issues of state law are involved and, in any event, the issue involved is not sufficiently important to warrant this Court's attention.

A review by this Court would involve only questions of evidence applied under familiar legal rules which have been properly decided by the Arizona Supreme Court.





## COMMENT ON QUESTION PRESENTED BY PETITIONERS

Petitioners, in their presentation of the question presented for review, imply that the Arizona Supreme Court has denied them a review of one of the issues raised by petitioners on appeal. Yet, in their statement of the case the petitioners state that the "opinion" issued by the Arizona Supreme Court "did not review issue number seven." (See page 4 of the petition.)

In an attempt to capture the attention of this Court the petitioners have converted the Supreme Court's election to discuss only important issues in its opinion to a denial of appellate review. By that simple conversion process the petitioners then present to this Court a Due Process question.

The rule in Arizona is the same as in most jurisdictions. Only the more important issues are discussed in the opinion. However, to avoid the assertion that minor issues, such as petitioners' seventh issue, remain un-



resolved, the Arizona Supreme Court has repeatedly announced in its prior opinions that by affirming the trial court's judgment all assignments of error are finally adjudicated against the appellant. A contrary practice would require a discussion in each opinion of every assigned error, which in many cases, such as the instant case, include matters which are not instructive to the parties nor do they serve as precedents.

Thus, the petitioners' seventh assignment of error, which was directed to the trial judge's ruling on some evidentiary matters, was resolved when the Arizona Supreme Court affirmed the trial court's judgment. The Supreme Court either found the rulings were correct, or, if incorrect, were minor errors which did not prevent substantial justice from being done.

The petitioners have failed to mention that upon the filing of a petition for review with the Arizona Supreme Court all



appellate briefs filed with the Arizona Court of Appeals are transferred to the Arizona Supreme Court, and, if the petition is granted as in the instant case the entire record is transferred to the Arizona Supreme Court. Rules 23(d) and 23(g), Arizona Rules of Civil Appellate Procedure, 17A, A.R.S.

The foregoing procedure underscores the significance of the Arizona Supreme Court's holding, to wit:

Review of the entire record leads to the inescapable conclusion that at long last justice in this case has been done. Ariz. Const. art. 6 §27. All parties have had their day in court and it is time to bring this matter to a final conclusion. We approve the decision of the court of appeals except as to its determination that reversal was required because of the ex parte communications. That portion of the opinion is vacated. The judgment of the trial court is affirmed.

(See petitioners' appendix page A-17)

The constitutional provision referred to by the Arizona Supreme Court in its opinion, Ariz. Const. art. 6, §27 reads as



follows:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law. No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.

Thus, the issue the petitioners actually present to this Court is whether it is a denial of Due Process for the Arizona Supreme Court to dispose of some issues raised on appeal in a summary manner, or, does Due Process require that an appellate court discuss in its opinion each issue raised irrespective of its importance.

Stated another way, is it the purpose of the Due Process clause or of this Court to review the thousands of state appellate court decisions issued each year and the hundreds of thousands of issues presented to the state appellate courts and require that each issue, irrespective of its importance, be separately discussed in the opinions?



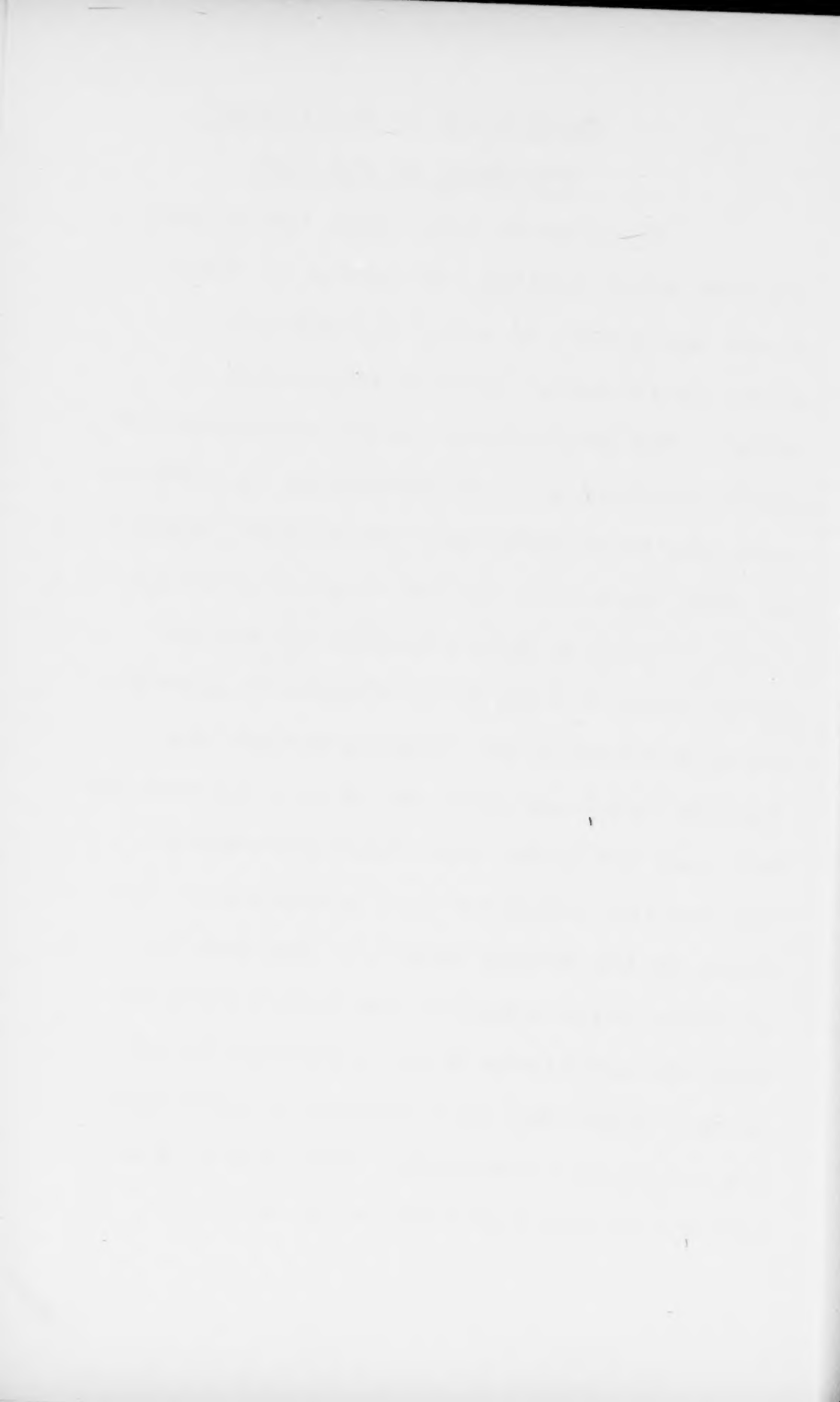


## CORRECTIONS TO PETITIONERS'

### STATEMENT OF THE CASE

Petitioners imply that the Arizona Supreme Court limited its review to their sixth assignment of error and did not consider petitioners' seventh assignment of error. The petitioners' sixth assignment of error involved a brief conference in chambers with the trial judge and the alleged impact of that conference on the trial proceedings.

Even a casual reading of the Supreme Court's opinion (petitioners' appendix pages A-1 thru A-18) discloses that the Supreme Court reviewed the entire proceedings not just the brief conference proceedings. The opinion commences with a summary of the facts of the entire case. It reviews the evidence which supports the jury's finding that the petitioner Hing, a practicing attorney, committed an intentional fraud upon the respondent McElhanon. The entire opinion of the Court of Appeals is examined.



The opinion reviews the incredible number of times the case has been before the courts:

The case now before us was filed eleven years ago. During this period of time, the parties have been involved in at least three superior court lawsuits, two of which were tried, one arbitration proceeding, and three hotly contested adversary trials in bankruptcy court. There have been five federal appeals, three appeals in our appellate system, and two previous petitions for review by this court. There have been five petitions in this court seeking extraordinary relief by special action. There have been two petitions for writ of certiorari from the United States Supreme Court.

Petitioners appendix page A-16.

After demonstrating that the Arizona Supreme Court had carefully considered both the entire record and the history of the litigation the opinion concluded:

REVIEW OF THE ENTIRE RECORD leads to the inescapable conclusion that at long last justice in this case has been done.

Petitioners' appendix page A-17, emphasis added.



## REASONS FOR DENYING THE PETITION

It is not surprising that the petitioners have failed to cite any relevant case in support of their position that a state appeals court must discuss in its opinion all of the issues raised in the appellant's brief as opposed to reserving the written opinion for the more important issues and disposing of minor issues in a summary manner. Indeed, the cases cited by petitioners state that appellate review is not a requirement of due process.

On page 7 of their petition the petitioners quote a portion of a statement from National Union of Marine Cooks and Stewards v. Arnold, 348 U.S. 37, 43 (1954) which is hereinafter repeated together with the portion of the statement (in upper case letters) which they omitted:

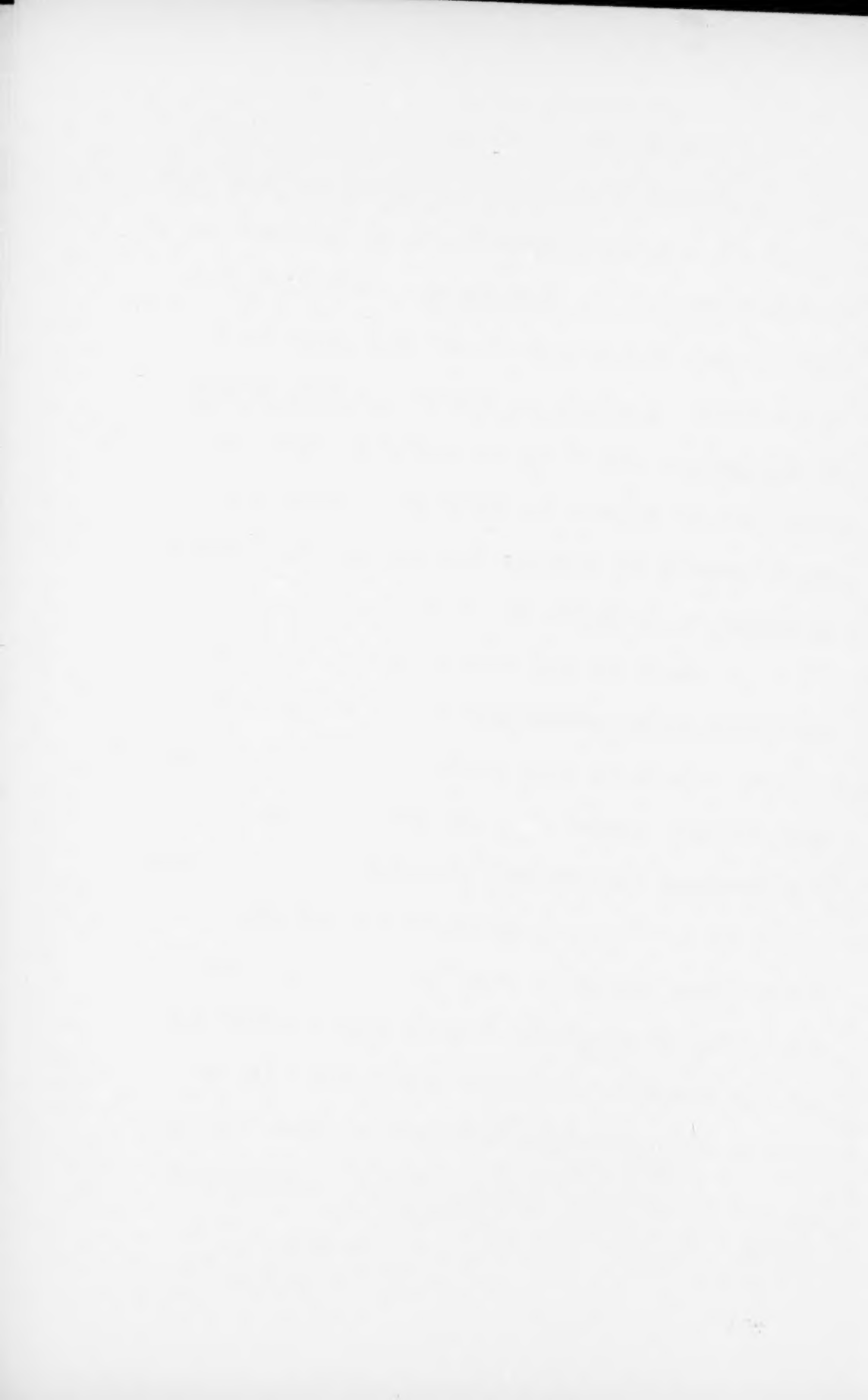
While a statutory right of review is important and must be exercised without discrimination SUCH A REVIEW IS NOT A REQUIREMENT OF DUE PROCESS.



The cases cited by the petitioners are inapposite. All of the cases concern the rights of criminal defendants to counsel on appeal (Douglas v. California, 373 U.S. 353 (1967)), or, the right of an indigent to a transcript (Griffin v. People of the State of Illinois, 351 U.S. 12 (1956)), or, the granting of appeal to some litigants and capriciously or arbitrarily denied to others (Lindsey v. Normet, 405 U.S. 56 (1971)).

Most of the cases cited concern discrimination under the Equal Protection Clause, which is not involved or alleged in the instant case. To the extent that the Due Process Clause was involved in the cases cited by petitioner this Court has emphasized that matters, such as effective assistance of counsel, invoke considerations of Due Process because "fairness" is required under the Due Process clause. (Evitts v. Lucey, 469 U.S. 387 (1985) ) However,





the petitioners have been dealt with fairly in this case. They have been afforded the very best counsel available. They have had full access to all transcripts. The doors of the appellate courts have remained open to them and they have passed through those doors more often than any appellants in the history of the State of Arizona.

However, what the petitioners demand is preferential treatment. They want this Court to order that all of the petitioners' assignments of error, no matter how trivial, be the subject of a separate discussion in the written opinion. They argue that it is insufficient that the Arizona Supreme Court affirm the rulings of the trial court. They want this Court to review state court proceedings and decide which issues the state appellate courts will accord extended treatment in their opinions. The Due Process Clause cannot be expanded to pro-



duce such an extreme result.

I

THE PETITIONERS' APPELLATE RIGHTS HAVE BEEN  
ACCORDED FULL RECOGNITION

The cases relied upon by petitioners stand for the proposition that if the citizens of a state are granted appeal rights then some citizens cannot be denied those rights. Consequently, this Court has held that indigents must be provided with a transcript and counsel. Additionally, the counsel provided must be effective.

Herein the petitioners have been afforded every opportunity to fully and completely present their position to the Arizona appellate courts. Indeed, the Arizona Supreme Court, in an unanimous opinion, examined the petitioners' claims from the inception of the case through the trial, then it reviewed the entire Court of Appeals opinion, and, finally, it vacated the Court



of Appeals' opinion on one issue and affirmed the trial court on all issues. Thus, the petitioners claims have been reviewed by a trial judge, a jury, the Court of Appeals, and finally, by a unanimous opinion of the Arizona Supreme Court.

The "fairness" requirement of the Due Process Clause upon which the petitioners rely has been abundantly observed and fulfilled. (It is noteworthy that the Arizona Supreme Court's opinion is authored by one of the nation's leading state appeals court jurists, Justice Stanley Feldman.)

## II

WHEN THE ARIZONA SUPREME COURT AFFIRMED THE JUDGMENT OF THE TRIAL COURT ALL OF THE PETITIONERS' ASSIGNMENTS OF ERROR WERE FINALLY ADJUDICATED AGAINST THEM THEREBY BECOMING THE LAW OF THE CASE WHICH COULD NOT BE ATTACKED BY THE ARIZONA COURT OF APPEALS EVEN IF THIS COURT ORDERED A REMAND TO THAT COURT.



The petitioners argue that this Court should remand this case to the Arizona Court of Appeals. Petitioners submit that upon remand the Arizona Court of Appeals could then decide and rule upon the petitioners' seventh assignment of error. However, the Arizona Supreme Court has already decided that issue by affirming the trial court's ruling on the evidentiary matters comprising petitioners' seventh assignment of error. That ruling is the law of the case and could not be disturbed by the Court of Appeals.

The legal effect of the Arizona Supreme Court affirming the judgment of the trial court has been repeatedly stated in numerous opinions by the Arizona Supreme Court and is summarized in State v. Superior Court of Pinal County, 22 Ariz. 452, 197 Pac. 537, 539, (1921):





The rule is, when a judgment is affirmed by this court, all questions raised by the assignments of error and all questions that might have been raised are to be regarded as finally adjudicated against the appellant.

The foregoing rule has been repeatedly adhered to by the Arizona Supreme Court.

Ferguson v. Superior Court, 59 Ariz. 314, 127 P.2d 131, 133 (1942); Pacific Greyhound lines v. Brooks, 70 Ariz. 339, 220 P.2d 477, 479 (1950)

More recently the Arizona Supreme Court stated the rule as follows:

It is true that when a court of last resort renders a final judgment, either by affirming the court below or by reversing without remand, it is deemed to have passed upon all issues of law which were raised or which might have been raised... .

Harbel v. Superior Court of Maricopa County, 68 Ariz. 303, 345 P.2d 427, 430 (1959)

The final issue raised by the petitioners is that the Arizona Supreme Court must separately discuss each assignment of error in



the written opinion and give its reasoning for the disposition of each issue. That argument has also been previously addressed by the Arizona Supreme Court and rejected.

In Phelps Dodge Corp., Morenci Br. v. Industrial Com'n, 368 P.2d 450, 90 Ariz. 379, 381, the court explained why it does not discuss each assignment of error in its written opinion, but, instead, disposes of many assignments of error summarily:

The Constitution requires that the Court's decision be in writing and the ground stated. Art. VI, Sec. 2. Certainly, parties to litigation are entitled to be advised of the reasons persuading the Court to its conclusion. Equally certain, the decision need not contain a seriatim rebuttal of points made or arguments advanced.

\* \* \*

We said that the questions for determination were not novel. Hence, the case could be and was disposed of summarily.

As hereinabove indicated the petitioners have been treated the same as other



appellants in Arizona. They have been accorded the fairness required by the Due Process Clause. The petitioners treatment by the courts of Arizona is summarized by the Arizona Supreme Court in its opinion in this case:

The parties have had more than their day in court. There comes a time when every case must end, otherwise, the process becomes more important than the resolution.

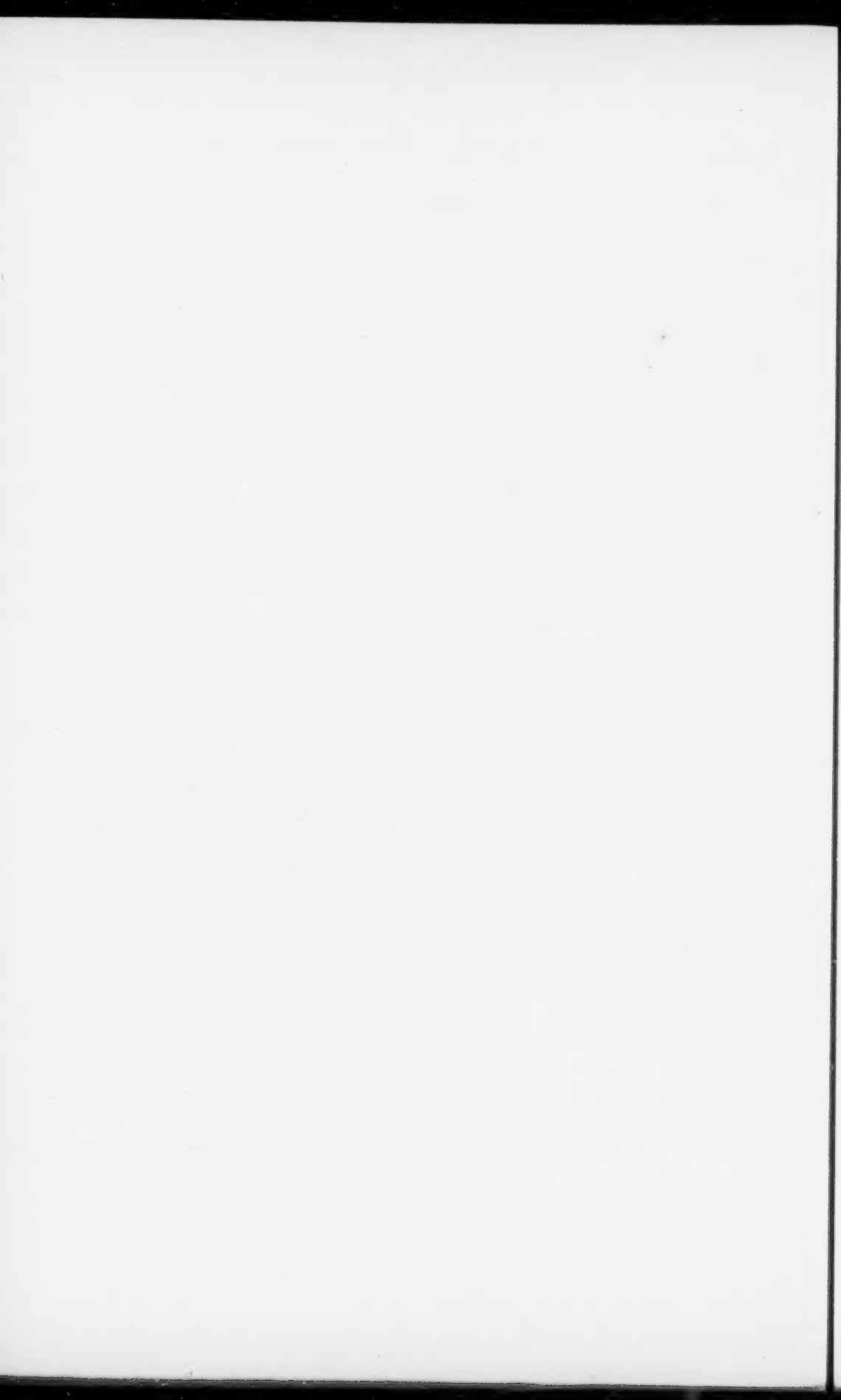
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Review of the entire record leads to the inescapable conclusion that at long last justice in this case has been done. Ariz. Const. art. 6, §27. All parties have had their day in court and it is time to bring this matter to a final conclusion. We approve the decision of the court of appeals except as to its determination that reversal was required because of the ex parte communications. That portion of the opinion is vacated. The judgment of the trial court is affirmed.

Petitioners' appendix, pages A-17 and A-18.

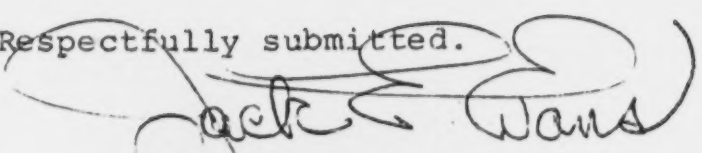
#### CONCLUSION

For the reasons stated above, the



Court should deny the Petition for a Writ  
of Certiorari.

Respectfully submitted.



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